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NO. 21030

In The

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MERLE W. MOORE,

Defendant.

Appeal of Lewis Roca Scoville Beauchamp & Linton and Harold R. Scoville, as collateral parties.

BRIEF OF APPELLEE

JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of Arizona on March 29, 1966 (T. 45), in the case of United States of America vs. Merle W. Moore, No. C-16857 Phx., and from the order denying the motion for rehearing, entered on April 18, 1966. There is no statute or other rule of law authorizing this appeal.

STATEMENT OF THE CASE

The appellee has been under indictment on three counts of tax evasion since February 18, 1964. (Tr.1-3,60) The appellants undertook to represent him in his tax troubles on or about January 30, 1961, and terminated the attorney-client relationship in September, 1963, because appellee was unable to pay the fee. (Tr.22) He has since been unable to pay any fees whatever. (Tr.7) Because its fee is unpaid, appellants refuse to grant appellee's present lawyer access to the case file. (Tr.40) The present lawyer has contended that without this file (which consists of correspondence with the Government and a transcribed copy of a statement given to the Government) he cannot adequately prepare for trial. (Tr.8,14,43)

The resulting controversy was brought before the District Court in Phoenix and has been orally argued there on three occasions. (Tr.61) The proceeding was initiated by the filing of a petition on February 4, 1966 and the issuance of an order on that date requiring appellants to show cause why they should not turn appellee's files over to his present lawyer. (Tr.13-15) At the hearing on this order the Court told counsel to work it out between themselves. (Tr. 61) A similar petition was presented on March 14, 1966, and a second order to show cause issued to appellants on that

date. (Tr. 16-19) On March 18, 1966, appellants filed a written response to this order which was directed to the merits of the controversy. (Tr. 20-21) No objection was made to the nature of the proceeding. On March 21, 1966, after oral argument, the Court ordered the former lawyers to give the present lawyer access to the file. (Tr.42 and 45)

Having lost this round, appellants on April 1, 1966 moved for a rehearing. (Tr. 22) In this motion, appellants, for the first time, objected to the nature of the proceeding, labeling it "summary" and, therefore, inappropriate. The motion for rehearing was denied on April 11, and again on April 18, 1966. (Tr. 62)

The appellee has been trying since at least January 18, 1966, to gain access to his file so that he will be prepared for trial. (Tr. 61) This has caused substantial delay in bringing this cause to trial. The trial set for February 1, 1966 had to be postponed to September 27, 1966. Another motion for continuance must be filed because of the delay occasioned by the appeal of a collateral party.

The issues that have arisen from this are:

1. Whether the order of the District Court requiring the former lawyers to give access to files to the present lawyer is appealable;

2. (a) Whether the District Court's order is reversable because of the summary nature of its proceedings; and

(b) Whether, in any event, appellants are not now estopped from objecting to the form of the proceedings;

3. Whether the order appealed from is invalid under the rule of Hickman v. Taylor; and

4. Whether the District Court was without jurisdiction because the procedure violated the Federal Rules of Criminal Procedure.

ARGUMENT

I. The District Court's Order of March 29, 1966 is Not An Appealable Order.

Absent specific statutory authority, federal courts have been most reluctant to permit piecemeal appeals of proceedings in the district courts. The policy underlying this reluctance is most strong in criminal cases where there is a particular urgency to get on with the cause without interruption after a man has been subjected to the stigma of a felony indictment. It is indeed Supreme Court law that the interest of a third party in protecting the privacy of his documents and papers must give way to the higher interest of the Courts and of parties to a criminal case to proceed promptly with the underlying action. And so it is held that there is no interlocutory appeal from the denial of a motion to quash a subpoena duces tecum calling for the production

of the appellant's papers. Cobbledick v. U.S. 309 U.S. 323, 60 S.Ct. 540, 84 L Ed. 783 (1940); Alexander v. U.S. 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906).

The opinion in the Cobbledick case (which affirmed a decision of this Court) is a learned discussion of this subject by the late Justice Frankfurter. It points out that the fact that the interest of appellant may be separable from and collateral to the underlying action does not of itself give rise to a right of appeal. Indeed, the right to appeal even after final judgment "is a matter of grace and not a necessary ingredient of justice**" 84 L.Ed. 783, 785. Furthermore, it holds that "the requirement of finality will be enforced not only against a party to the litigation, but against a witness who is a stranger to the main proceeding."

The case of Alexander v. U.S. (supra) is not materially distinguishable from Cobbledick. It holds that in a case such as the one before us, where a recalcitrant third party is ordered to turn over papers which are necessary for the proper conduct of a trial,

his right to appeal does not arise until after he has disobeyed the order and has been adjudged in contempt. Until then, the proceeding as to him is merely interlocutory. Mr. Justice McKenna put it this way:

> "In a certain sense, finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a Court. And, such an order may coerce a witness leaving him no alternative to obey or be punished. Let the Court go further and punish the witness for contempt of its order -- then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case.*** This power to punish being exercised, the matter becomes personal to the witness and a judgment as to him. Prior to that, the proceedings are interlocutory in the original suit." 50 L ed. 686, 686.

This Court has applied the Cobbledick rule even in a civil case where it appeared that recognition of the right to an interlocutory appeal would unduly hamper the progress of the action at the district court level. Acheson v. Nobuo Ishimaru, 185 F 2nd. 547 (9th Cir. 1950) This was a declaratory judgment action against the Secretary of State in which the plaintiff, Ishimaru, sought a judgment declaring that he was a national of the United States. He was, however, unable to attend his

trial, which was pending in Hawaii, unless the Secretary of State issued him a Certificate of Identity. The District Court ordered that such a Certificate be issued to the plaintiff and from this order the Secretary of State appealed. This Court held that the order was not appealable since it did not fall in that small class of orders referred to in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L ed. 1528 (1949). See also 6 Moore's Federal Practice, 54.14.

It appears from the foregoing that the applicable rule is that at least in a criminal case an interlocutory right of an appeal will not be recognized in favor of either a party or a stranger to the action who has been ordered to turn over unprivileged papers in his possession which the trial Court deems necessary for the proper conduct of the litigation. The rule has special applicability in a case such as this where the papers being sought are essential to the proper defense of a person charged with a serious crime. Certainly, he should be entitled to get on with his case without being subjected to time consuming and expensive appeals by his creditors.

II. The Appellants, Having Participated Without Objection in the Proceedings Below, Cannot Later Be Heard to Complain That They Were Unfair. In Any Event the Proceedings Were Appropriate and Reasonably Suited to the Business at Hand.

On March 14, 1966, the District Court in Phoenix, Arizona, on the petition of the appellee, issued an order directed to the appellants requiring them to appear before the Court on March 21, 1966 and show cause, if any, why they should not be required to provide access to all files and papers relating to this case to the appellee or his attorney. On March 17, 1966, appellants filed their Response to Order to Show Cause. Appellants maintained in this Response that the papers in their Merle Moore file were their work product and Moore could not see them until he paid his fee. There is not even a suggestion in this Response that appellants in any way objected to the Court's jurisdiction over their persons; nor did the appellants in this Response in any way make an objection to the Court's jurisdiction of the subject matter; and there is no inkling that the appellants in any way objected to the procedures being followed in

the District Court to resolve this legal file controversy. It was only after appellants engaged in the battle and lost that they apparently came to the conclusion that the ground rules were not fair. This belated objection to the "summary" nature of the proceeding, being untimely, should not be considered.

The case is indistinguishable from that of McComb v. Goldblatt Bros., 166 F. 2nd 387 (7th Cir. 1948). In this case the plaintiff, who was the Administrator of the Wage and Hour Division of the Department of Labor, sought an injunction against the defendant under the Fair Labor Standards Act, contending that the defendant was violating the minimum wage law. Upon the defendant's suggestion, the plaintiff acquiesced to a procedure whereby the principal issue of fact would be tried on affidavits. This procedure was followed and the ruling went against the plaintiff, whereupon he claimed for the first time foul play. The procedure was upheld. See also Maloney v. Brandt, 123 F. 2nd 779 (7th Cir. 1939); National Labor Relations Board v. Townsend, 185 F. 2nd 378 (9th Cir. 1950).

Furthermore, when we explore the alternative

advocated by the appellants, we find it leads to a completely absurd result. The alternative would be that the appellee, the defendant in the criminal case below, would be required to bring an action in replevin in the state court in order to get the file to which he feels he is entitled and which he feels is absolutely essential to his defense. He would be required to plead that he is the owner of the file, that he is lawfully entitled to its possession, and that it is wrongfully being retained by the defendants. Upon the filing of a bond the sherrif would be ordered to seize the property, but before he actually got his hands on it the defendants would similarly file a bond and thereby would be entitled to the possession of the file for the duration of the action. The defendants would naturally demand trial by jury to which they would be entitled, thus postponing the determination of the controversy for a very substantial period of time. Meanwhile, the United States Attorney would be insisting that the criminal action in the District Court be prosecuted and the Federal District Court Judge would be in the position of pleading with the parties to hurry it along so that he could get on with his criminal

calendar. Years later, the defendant, armed with his file (if the state court jury saw fit to give it to him), would return to the Federal District Court and announce that he was ready to proceed. All this is not facetious argument. The hard fact is that if the criminal defendant were required to pursue his remedy in a plenary proceeding, he would have to go to the state court and rely on it to make the determination necessary to assure him of a fair trial in the Federal District Court. The absurdity is propounded when we consider that there isn't even an issue of fact involved in this controversy.

Finally, in the consideration of this summary-plenary proceeding issue, it may be profitable to look at the experience of the bankruptcy courts. Referees in bankruptcy are faced almost daily with the question of whether they can order summarily that assets in the hands of third parties be turned over to the trustee in bankruptcy, or whether the trustee in bankruptcy should be required to bring an independent and so-called plenary action to acquire the assets. The dividing line between what may be done summarily and what must be prosecuted in a plenary fashion was rather clearly delineated in Maggio v. Zeitz, 333 U.S. 56, 68

S.Ct. 401, 92 L ed. 476 (1948). The Supreme Court in this case likened the bankruptcy court's summary turnover proceeding to the common law actions of replevin and detinue. These actions provided specific relief for the wrongful detention of chattels, as distinguished from trespass or trover which were actions for damages. The Court's opinion went on:

> "**the primary condition of [summary] relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so." 333 U.S. 56, 63, 92 L ed. 476, 484.

The Court went on to reason that if the bankruptcy court seeks damages for wrongful conduct or seeks to recover money which has been embezzled, then the plenary action must be pursued. The point is that if the court merely wishes to acquire papers having no inherent value, it may issue a turnover order for them in a summary proceeding. If on the other hand, it seeks money, which is only arguably owing by the person proceeded against, then that person is entitled to a full scale trial of the issues of fact. By the analogy then to the bankruptcy courts experience in summary and plenary proceedings, we again come to the inescapable conclusion that summary proceedings such as were conducted below were appropriate to the prosecution of the business at hand.

III. The Order Appealed from Does Not Violate the Rule of Hickman v. Taylor.

The appellants contend that the order of the District Court should be reversed because it violates the rule of Hickman v. Taylor, 329, U.S. 495, 67 S.Ct. 385, 91 L Ed. 451, (1947). A simple and brief comparison between the holding in the Hickman case and the facts of this case should be sufficient to dispose of this argument.

Hickman v. Taylor holds that a party in a civil case is not entitled under Rule 26, Federal Rules of Civil Procedure, to secure from the attorney of an adverse party the production of witnesses' written statements and the attorney's mental impression as to their oral statements, without a showing of necessity. But the case of U.S. vs. Moore is not a civil case; the criminal defendant below did not proceed under Civil Rule 26; and the criminal defendant below did not seek witnesses' statements from the attorney for an adverse party. Finally, the criminal defendant below did make a showing of necessity for the papers that the Court ordered the appellants to turn over to appellee.

IV. The Objection to An Alleged Violation of the Federal Rules of Criminal Procedure is Not Timely. Those Rules Did Not Apply To This Proceeding. If They Did Apply There Was Not A Material Violation.

After the appellants participated in the proceeding below and failed to prevail they raised for the first time their objections to the procedures that had been followed. They lately complain that it was a "summary" proceeding and there should have been a full scale trial. In the same vein, they lately complain that the procedural niceties of the Federal Rules of Criminal Procedure were not adhered to. For the reasons discussed under II above this objection should be dismissed.

In any event the proceeding below is not of the sort which is governed by the Criminal Rules. The proceeding was simply a hearing by a judge to settle a squabble between a litigant in his court and certain officers of the court who were formerly his lawyers. The power to settle this sort of squabble is inherent in the judge's office. The only procedural requirements are those of notice and hearing. In this case the Judge was completely fair and eminently courteous to those before him. He followed all rules of fundamental fairness.

Even if the Criminal Rules were held to apply to this case there would still be no grounds for appeal because those Rules were not materially breached. Rule 17 (c) provides that the Clerk may issue a subpoena directing a person to produce papers for inspection before a trial. If appellee had followed this procedure appellants would have moved to quash the subpoena. There would then have been a hearing (just like the one that was held) and that would be followed by an order (just like the one that was issued). Since under either procedure the result is the same there can be no claim of harm. Accordingly this cannot be the basis of an interlocutory appeal.

CONCLUSION

The recognition by this Court of a right to appeal Judge Craig's order would be inconsistent with the rulings of the Supreme Court. It would furthermore encourage interlocutory appeals by persons who for various reasons do not want unprivileged papers to be subjected to scrutiny by parties in litigation.

The proceedings below were eminently fair. The controversy was orally argued three times. Only after the order was issued did anyone suggest that there should have been a full scale trial and that the Federal Rules of Criminal Procedure should have been strictly adhered to. These procedural objections, in addition to being tardy, are absurd. The argument that the rule of Hickman v. Taylor is applicable in this case is specious. It deals with something else altogether.

Permitting Merle Moore access to his file in accordance with the order of March 21, 1966 is legally proper. But more than that, it is the fair thing to do.

Respectfully submitted,

Philip J. Shea

Philip J. Shea
Lawyer for Merle Moore, Appellee
August 19, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, this brief is in full compliance with those rules.

Philip J. Shea

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